

This is a claim for injuries sustained in both July and September 1991 resulting in bilateral carpal tunnel syndrome, right elbow epicondylitis, and low back strain. In the initial Award dated July 16, 1996, Judge Moore determined that claimant had a 24.6 percent

permanent partial general disability. When that Award was appealed, the Appeals Board increased the permanent partial general disability to 46 percent. The respondent appealed to the Court of Appeals which then reversed and remanded this proceeding.

The parties could not agree to the purpose of the remand. Claimant contends the Court of Appeals remanded the case to reconsider claimant's permanent partial general disability in light of the cases cited in the Court's Memorandum Opinion. In addition, claimant contends the Court's findings of fact are not supported by the record.

Conversely, respondent and its insurance carrier contend the purpose of the remand is clear – that the Appeals Board is to merely enter an Award for benefits based upon its previous finding that claimant sustained a 21 percent whole body functional impairment.

As the parties have stipulated to the average weekly wage, the only issue that the Appeals Board will address on this remand is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. In early 1982, Joseph A. Miller began working at United Parcel Service (UPS) sorting and loading packages weighing up to 70 pounds. As packages were unloaded from a semitrailer and sent down a conveyor, Mr. Miller would sort them and select those packages he was responsible for loading onto a truck. He pushed the other packages onto another conveyor. A semitrailer would hold up to 4,000 packages. The job was repetitive and physically strenuous.
2. The parties stipulated that Mr. Miller sustained personal injury by accident arising out of and in the course of his employment with UPS on July 31, 1991. Although he completed an accident report for an accident on that date, Mr. Miller could not recall any specific facts about that accident when he testified at the November 1995 regular hearing.
3. Mr. Miller sustained a second accident on September 10, 1991. On that date, he injured himself while sorting and pushing parcels that had become jammed on the conveyor. As a result of these specific accidents and his repetitive work activities, Mr. Miller developed bilateral carpal tunnel syndrome, epicondylitis in the right elbow, and low back strain.
4. Mr. Miller worked for UPS on a part-time basis. At the time of his accidents, Mr. Miller also worked as a plumber's helper for Stueder Contractors, where he worked on a full-time basis from April 1991 through March 1994.

5. Although only working at UPS approximately 20 hours per week, Mr. Miller's average weekly wage at UPS was \$499.96 (including additional compensation items) compared to approximately \$280 per week working full time at Stueder.

6. After seeing several other doctors, in November 1991 Mr. Miller began treating with orthopedic surgeon and hand specialist J. Mark Melhorn, M.D. When Mr. Miller first saw Dr. Melhorn on November 8, 1991, he reported symptoms in his right hand and wrist and in his low back. Dr. Melhorn only treated Mr. Miller's hands and wrists. The doctor performed carpal tunnel release surgery on the right hand and wrist in December 1991 followed by a release on the left hand and wrist in January 1992. The doctor last saw Mr. Miller in March 1992. At that time, the doctor released Mr. Miller to a modified work environment and to his regular work as tolerated. The doctor believed Mr. Miller would need help with the heavier lifts and should probably rotate his job tasks.

7. Between surgeries Dr. Melhorn released Mr. Miller to light work. Mr. Miller asked UPS for accommodated work but was refused. After both wrist surgeries, Mr. Miller returned to UPS in March 1992 and worked less than one shift. After sorting and pushing packages for a short period, Mr. Miller reported that his elbow was hurting and he was referred to another doctor and eventually came under treatment of orthopedic surgeon C. Reiff Brown, M.D. That is the last time that Mr. Miller worked at UPS. The record is not clear whether Mr. Miller returned to UPS to ask for an accommodated job after completing medical treatment in July 1992.

8. Dr. Brown first saw Mr. Miller in May 1992 on a referral from another doctor. According to Dr. Brown, Mr. Miller aggravated a preexisting disc problem while pushing jammed packages at UPS. The doctor treated Mr. Miller's low back and right arm with medications, physical therapy, and injections in the right sacroiliac ligaments. After having Mr. Miller undergo a functional capacity assessment in July 1992, the doctor felt that Mr. Miller could safely lift 40 pounds and should eventually be able to lift up to 50 pounds frequently and 75 pounds occasionally with proper body mechanics.

9. Mr. Miller saw neurosurgeon Revis C. Lewis in February 1993. Dr. Lewis diagnosed carpal tunnel syndrome previously operated, ligament injury to the right elbow, and low back strain. Based upon his evaluation and a review of Mr. Miller's medical records, Dr. Lewis felt that Mr. Miller should permanently avoid lifting more than 20 pounds frequently and 30 pounds occasionally, and avoid repetitive bending and prolonged standing or sitting.

10. Although Mr. Miller did not work at UPS after March 1992, he continued working for Stueder Contractors through March 1994 and then began working as a journeyman plumber at another plumbing company where he worked until November 1994.

11. At the time of Mr. Miller's accidents in 1991, UPS limited the weight of packages to 70 pounds. But in 1994 UPS increased the maximum weight limit to 150 pounds.

Considering Mr. Miller's permanent work restrictions and limitations, along with the repetitive and physical nature of the work at UPS, the Board finds that he is no longer able to perform his former job sorting and loading packages.

12. The Appeals Board adopts those findings as set forth in its February 28, 1997 Order.

CONCLUSIONS OF LAW

1. Because Mr. Miller was injured in 1991, his permanent partial general disability is to be determined by considering the loss in his ability to perform work in the open labor market and his loss of ability to earn a comparable wage.¹ The principal issue presented to the Appeals Board in the initial appeal was how to analyze those losses when a worker is working both full-time and part-time jobs on the date of accident. Without addressing those issues, the Court of Appeals reversed the Board's decision and remanded the case without stating the purpose of the remand. Therefore, it is not clear whether the Court remanded the proceeding to enter an award based upon Mr. Miller's 21 percent whole body functional impairment rating or whether the Board was to reconsider the issue of permanent partial general disability in light of Foulk² and Copeland.³

2. The Memorandum Opinion states, in part:

Appellants [the respondent and its insurance carrier] claim the Board erred in finding Miller was entitled to a work disability award, and we agree. Simply put, it is unreasonable to hold the legislature intended to encourage workers to sit at home, refuse to work, and take advantage of the system. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 284, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); see *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, Syl. ¶ 6, 944 P.2d 179 (1997).

After making the above statement, the Court then made certain findings and then entered its order reversing and remanding the case.

3. Mr. Miller contends several findings made by the Court of Appeals are not supported by the record. Nevertheless, the Board is bound by them for purposes of this remand.

¹ K.S.A. 44-510e (Ensley).

² *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 284, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

³ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

4. The Board concludes that the Court of Appeals determined, as a matter of law, that Mr. Miller is not entitled to permanent partial general disability benefits greater than his functional impairment rating. Therefore, Mr. Miller's permanent partial general disability is 21 percent.

AWARD

WHEREFORE, the Appeals Board modifies its Order dated February 28, 1997, and its Nunc Pro Tunc Order dated March 24, 1997, to reduce the permanent partial general disability to 21 percent.

Joseph A. Miller is granted compensation from United Parcel Service and its insurance carrier for a July 31, 1991 accident and resulting 21 percent permanent partial general disability. Based upon a \$499.96 average weekly wage, Mr. Miller is entitled to receive 3 weeks of temporary total disability benefits at \$289 per week, or \$867, followed by 412 weeks of permanent partial disability benefits at \$70 per week, or \$28,840, for a 21 percent permanent partial general disability, making a total award of \$29,707, which is all due and owing less any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Richard A. Boeckman, Great Bend, KS
Jerry M. Ward, Great Bend, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director